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12 **UNITED STATES DISTRICT COURT**
 13 **SOUTHERN DISTRICT OF CALIFORNIA**

15 HANSEN BEVERAGE COMPANY, a
 16 Delaware corporation

17 Petitioner,

18 vs.

19 DSD DISTRIBUTORS, INC., a
 20 Wisconsin corporation

21 Respondent.

Case No: 08 CV 0619 LAB RBB

**DSD DISTRIBUTORS, INC.'S
 RESPONSE TO HANSEN
 BEVERAGE COMPANY'S EX
 PARTE APPLICATION FOR
 LEAVE TO FILE SURREPLY**

Judge: Hon. Larry A. Burns

Hearing

Date: June 9, 2008
 (Matter taken under submission without
 oral argument)

24
 25 Petitioner Hansen Beverage Company ("Hansen") has requested leave to file
 26 the surreply that Petitioner has effectively already filed with the Court, and without
 27 even attempting to set forth why DSD has "good cause" for this *ex parte*
 28 application or surreply. Respondent DSD Distributors, Inc. ("DSD") asks that the

REPLY TO EX PARTE APPLICATION FOR LEAVE TO FILE SURREPLY
 CASE NO. 08 CV 0619 LAB RBB

1 Court deny Petitioner's motion and strike Petitioner's surreply for failure to show
 2 good cause.

3 In the alternative and in response, DSD asks the Court to note that, with
 4 regard to Hansen's first point, if Hansen believes that the additional local
 5 defendants in the Wisconsin action were only added to defeat diversity, as Hansen
 6 appears to suggest in its surreply, Hansen certainly could have still sought to
 7 remove that action and argue those parties were "sham" defendants. Hansen did
 8 not do so.

9 With regard to Hansen's second point, Hansen's claim that it "did not agree .
 10 . . that Wisconsin law governed the arbitration and all claims raised and resolve[d]
 11 in the arbitration" is simply incorrect. The parties' contract incorporates the JAMS
 12 Comprehensive Arbitration Rules and Procedures, of which Rule 25 states that
 13 enforcement of awards shall be governed by the FAA "or applicable state law."
 14 Hansen thus agreed to application of Wisconsin law in the original contract by
 15 contracting with a Wisconsin dealer protected by Wisconsin law. The Arbitrator's
 16 Choice of Law ruling then confirmed this, and specifically stated that "Hansen
 17 *agree[d]*" that Wisconsin law would apply if DSD is found to be a dealer. (DSD
 18 Reply, p. 7, lns. 3-11.) Hansen then proceeded to arbitrate the dispute in spite of
 19 this ruling, and DSD was found to be a dealer.

20 Likewise, Hansen's claim that the Arbitrator's Final Award somehow
 21 contradicts his earlier ruling to hold that only California law applies to
 22 confirmation of the award (see Ex Parte App., p. , lns. 4-9) is also simply false, and
 23 misleads this Court. To the contrary, the Final Award, as quoted by Hansen itself,
 24 notes that "the Federal Arbitration Act and the JAMS Comprehensive Rules"
 25 apply, and, as noted above, the JAMS Comprehensive Rules call for application of
 26 the FAA or "applicable state law."

27 In this case, Hansen cannot deny that application of the Wisconsin Fair
 28 Dealership Law was the central issue in the arbitration, and thus application of

1 Wisconsin law is central to any evaluation of whether the Arbitrator properly
2 carried out his duties. Indeed, the Wisconsin Fair Dealership Law itself expressly
3 prohibits parties from circumventing its protections by way of contract.¹ Hansen
4 also cannot deny that a Wisconsin state court is best positioned to make this
5 determination, and can do so whether through application of Wisconsin's law
6 related to enforcement of arbitrations, or the FAA itself. *See Southland Corp. v.*
7 *Keating*, 465 U.S. 1, 15-16, 104 S.Ct. 852, 860-861 (1984) (state court may apply
8 FAA).

9 Accordingly, there is no reason why a California state or federal court must
10 hear Hansen’s petition – and because this federal Court lacks subject matter
11 jurisdiction and because of the pending parallel action in Wisconsin, DSD
12 respectfully submits this Court may not hear this petition.

Respectfully submitted,

14 | Dated: June 10, 2008

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By: /s/ Leila Nourani
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DSD DISTRIBUTORS, INC.,
a Wisconsin corporation

²⁷ ¹ Wis. Stat. § 135.025(3) (“The effect of this chapter may not be varied by contract or agreement. Any contract or agreement purporting to do so is void and unenforceable to that extent only.”)